IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

C. AND C.S., FOR THEIR MINOR DAUGHTER H.S. Plaintiffs	§	
v.	§	**C.A. NO. 1:09-cv-374**
SILSBEE INDEP. SCH. DIST., SUP'T. RICHARD BAIN, JR., PRIN. GAYE LOKEY, SISSY McINNIS, DAVID SHEFFIELD, CHRISTIAN ROUNTREE, and RAKHEEM BOLTON Defendants.	§	

RESTATED MOTION FOR ATTORNEY FEES AND COSTS

Defendants Gaye Lokey and Sissy McInnis move that, in the event their Motion to Dismiss Plaintiffs' First Amended Complaint is granted, they and each of them be awarded reasonable attorney fees and costs from Plaintiffs, as provided in 42 U.S.C. § 1988.

Prevailing defendants in a 42 U.S.C. § 1983 action are entitled to recover attorney fees and costs, when plaintiff's suit is determined to be frivolous, unreasonable, vexatious, or without foundation or merit. *Christiansburg Garment Co. v. Equal Employment Opportunity Commission*, 434 U.S. 412, 422 (1978); *accord: Hughes v. Rowe*, 449 U.S. 5 (1980).

A party that fails to state a claim cannot be a prevailing party. *Wax N' Works v. City of St. Paul*, 213 F.3d 1016 (8th Cir. 2000).

Plaintiffs' claims in this cause are patently frivolous, unreasonable, vexatious, and utterly without foundation or merit. Plaintiffs claim that H.S. was deprived of free speech rights, and of property and liberty interests without due process of law, because she was suspended from the cheerleading squad for two games for refusing to cheer when it did not please her to do so. Can

a more frivolous, meritless claim be imagined? There exist no rights giving rise to a constitutional claim in an extracurricular activity. *Dangler v. Yorktown Central Schools*, 777 F.Supp. 1175, 1175-1177 (W.D.N.Y. 1991, holding that defendants school district and principal were entitled to attorneys fees in a civil rights action in which a high school student was denied admission to National Honor Society). See also *Niles v. University Interscholastic League*, 715 F.2d 1027, 1031 (5th Cir. 1983). ("The federal constitution due process guarantees do not protect a student's interest in participating in extracurricular activities.").

Plaintiffs also assert that Defendants Gaye Lokey and Sissy McInnis "retaliated" against H.S. for exercising a purported free speech right – the refusal to cheer for certain players at a basketball game. H.S.'s refusal to cheer was a violation of school rules, for which H.S. was disciplined. It is frivolous and unreasonable to bring such a claim when it is established that school districts, not federal courts, have the authority to decide what constitutes appropriate behavior in public schools. *Canady v. Bossier Parish School Board*, 240 F.3d 437 (5th Cir., 2001). *See also Dangler*, 777 F.Supp. at 1177 (action was frivolous where faculty selection committee evaluated student's [National Honor Society] application on its merits without regard to article authored by student or litigious activities of student's father).

WHEREFORE PREMISES CONSIDERED, Defendants Gaye Lokey and Sissy McInnis pray that Plaintiffs' Original and First Amended Complaints be found to be a textbook example of a frivolous, unreasonable, vexatious, and meritless claim, as being wholly without foundation as against these Defendants, and that in the event Defendants Gaye Lokey and Sissy McInnis should prevail, they and each of them be awarded reasonable attorney fees and costs from these Plaintiffs.

Respectfully submitted,

ROACH & NEWTON, L.L.P.
2905 Toccoa Street
Beaumont, Texas 77703
Telephone: (409) 832-0347
Facsimile: (409) 838-0167
E-mail: jnewton@roachnewton.com

By: */s/ John W. Newton III*
John W. Newton III
Texas State Bar No. 14983300

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing instrument was properly mailed to all counsel of record by:

___ United States Mail, postage prepaid and sealed;

___ United States Certified Mail, return receipt requested;

___ hand-delivery;

___ Federal Express;

___ facsimile;

_x__ eFile

on this the 7th day of August, 2009.

/s/ John W. Newton III
John W. Newton III